UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-1 UMAR FAROUK ABDULMUTALLAB,

Defendant.

_____/

CASE NO. 2:10-cr-20005

HONORABLE NANCY G. EDMUNDS

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

The defendant has moved for a change of venue to a location outside the state of Michigan, citing prejudicial pretrial publicity. The United States respectfully requests that the Court deny defendant's motion since he has failed to carry his burden of demonstrating that he is unable to obtain a fair trial in this district. Contrary to the defendant's contention, prejudice in the jury venire in this district has not been shown and should not be presumed. Rather, the Court should conduct a *voir dire* of the prospective jurors so that the bias of any potential jurors based on pretrial publicity can be explored and tested.

The Sixth Amendment affords the defendant the right to trial by an impartial jury. The United States Constitution establishes that trials are to be held in the district where the offense occurred. *See* U.S. Const.., Art. III, § 2, cl.3 ("The trial of all crimes . . . shall be held in the State where the said crimes shall have been committed"); U.S. Const., Amend VI (All criminal trials are to be conducted "by an impartial jury of the State and district wherein the crime shall have been committed.") These constitutional mandates yield only "if extraordinary local

prejudice will prevent a fair trial." *Skilling v. United States*, 130 S.Ct. 2896, 2913, ___ U.S. ___ (2010).

Federal Rule of Criminal Procedure 21 governs venue transfer in federal court. That rule instructs that a "court must transfer the proceeding . . . to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed.R.Crim.Pro. 21. The decision regarding change of venue is committed to the trial judge's discretion. *United States v. Chambers*, 944 F.2d 1253, 1262 (6th Cir. 1991)(superseded by statute on other grounds).

The Supreme Court has drawn a distinction between presumed and actual prejudice from pretrial publicity. *Murphy v. Florida*, 421 U.S. 794 (1975). "Presumptive prejudice from pretrial publicity occurs where an inflammatory, circus-like atmosphere pervades both the courthouse and the surrounding community." *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007)(citations omitted). As the Tenth Circuit explained,

> In order for a reviewing court to reach a presumption that inflammatory pretrial publicity so permeated the community as to render impossible the seating of an impartial jury, the Court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial.

United States v. McVeigh, 153 F.3d. 1166, 1181 (10th Cir. 1998)(citing *Sheppard v. Maxwell*, 384 U.S. 333, 345). "Where pretrial publicity cannot be presumed prejudicial, the trial court must then determine whether it rises to the level of actual prejudice. The primary tool for discerning actual prejudice is a searching *voir dire* of prospective jurors." *Foley*, 488 F.3d at 387 (citations omitted).

In this case, the defendant asks the Court to presume prejudice from pretrial publicity and

claims that it will be impossible to seat an impartial jury. A presumption of prejudice, however, "attends only the extreme case." *Skilling*, 103 S.Ct. at 2915. The defendant bears an "extremely heavy burden" to show that pretrial publicity will deprive him of an impartial jury. *Coleman v. Kemp*, 778 F.2d 1487, 1537 (11th Cir. 1985). Reflecting the high bar the defendant must hurdle, "[p]rejudice from pretrial publicity is rarely presumed." *Foley*, 488 F.3d at 387 (citation omitted).

The defendant has entirely failed to meet his burden in this case. The defendant's argument that prejudice to the venire should be presumed rests entirely on the quantum of news articles and television broadcasts that have issued relating to this case. (Defendant's Motion at 2.) Defendant asserts that more than 14,000 news articles, documentaries, and televised broadcasts have referenced this case. *Id.* However, it is unclear whether this number includes, for instance, all newspapers published throughout the country – a measure that is too broad to gauge the amount of publicity to which the venire has been exposed. It is also unclear whether the defense figure embraces all international papers – an unlikely source of news for the venire. A Westlaw search conducted by the government of printed news media published in Michigan coupled with major national news media indicates 965 references to this case or the defendant – a number significantly lower than 14,000. Both the government and defense figures exaggerate what a single juror would have seen or heard about the case since a single event is repeated among multiple news sources.

Regardless of the precise number of news reports a prospective juror has read or heard, it is clear that jury exposure to extensive media accounts of the crime alone does not presumptively deprive the defendant of due process. *Murphy*, 421 U.S. at 798-799; *see also, Chambers*, 944

F.2d at 1262. "[P]retrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976). As the Supreme Court explained in *Skilling*:

> Prominence does not necessarily produce prejudice, and jury *impartiality*, we have reiterated does not require *ignorance*. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct 1639, 6 L.Ed.2d. 751 (1961)(Jurors are not required to be 'totally ignorant of the facts and issues involved'; 'scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.'); *Reynolds v. United States*, 98 U.S. 145, 155-56, 25 L.Ed. 244 (1979)('[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.')

Skilling, 103 S.Ct. at 2914-15 (italics in original).

In considering whether to presume juror prejudice, courts look beyond the sheer amount of media coverage. For instance, courts have heavily weighted the "size and characteristics of the community in which the crime occurred." *Skilling*, 130 S.Ct. at 2915. In *Skilling*, a former Enron Chief Executive Officer was charged with offenses related to deceiving investors and others about Enron's performance before its collapse in bankruptcy. The Supreme Court emphasized that Houston, where Enron was based and the trial occurred, was the fourth most populous city. *Id.* A population of 4.5 million individuals eligible for jury duty resided in the Houston area. *Id.* The Court concluded that "given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Id.*

Other cases have similarly found that the size of the area from which the venire was drawn reduced the likelihood of prejudice. *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991)(size of the metropolitan Washington, D.C. area, with a population of over 3 million, mitigated

potential for prejudice); *Gentile v. States Bar of Nev.*, 501 U.S. 1030, 1044 (1991)(plurality opinion)(likelihood of prejudice diminished where there were over 600,000 individuals eligible jurors.) According to U.S. Census Bureau data, the population of Detroit and its surrounding suburbs is on the order of Houston's population – nearly 4.3 million individuals.[1] Detroit is the eighteenth largest city in the nation. As in *Skilling*, the defense contention that an impartial jury cannot be found from such a large pool is untenable and should be rejected.

Another factor considered by courts in assessing whether to apply a presumption of prejudice is whether the news reports contained a "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 130 S.Ct. at 2916. Unlike in *Rideau v. Louisiana*, 373 U.S. 723 (1963), where the defendant's broadcast confession "was likely imprinted indelibly in the mind of anyone who watched it," *id.*, the publicity in this case has been largely impartial reporting on the public court proceedings and motions. The defense motion admits as much. (Defendant's Motion at 2). Press coverage in this case is not of the same inflammatory, sensational nature as that which occurred in *Irvin v. Dowd*, 366 U.S. 717 (1961). In that case, reports were published on the day before trial of the defendant's admission to the charged murder, as well as to the murders of other victims from the area in which he was being tried. *Id.* at 725-726. As in *United States v. Johnson*, much of the publicity in this case has been "primarily descriptive of the indictment . . and related proceedings." 584 F.2d 148, 154 (6th Cir. 1978). Attached as Exhibit A are the past ten reports from the Detroit News. The content of those articles, which appear to simply report on court proceedings and filings, is illustrative of the publicity in this case.

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[1] *See* http://www.census.gov/2010census.

In weighing whether to apply a presumption of prejudice, courts also consider the timing of the publicity and whether "trial swiftly followed a widely reported crime." *Skilling*, 103 S.Ct. at 2916. In *Skilling*, the Supreme Court noted the four years that had elapsed between Enron's bankruptcy and Skilling's trial. Although there was news coverage throughout the period, "the decibel level of media attention diminished somewhat in the years following Enron's collapse." *Id.* at 2916. Here, trial will take place almost two years after the occurrence of the crimes charged. A review of the press coverage of this case indicates that it was at its peak at the time of the incident and has tapered off since then, although, as in Enron, there continue to be news accounts of court proceedings and filings. For example, there have been a total of 285 printed media reports in the Eastern District of Michigan; 161 of those reports – more than half – occurred in the one month following the incident on December 25, 2009.

The defendant makes several unsupported claims about the impact of this case on the community in urging the Court to presume prejudice. For instance, without any evidentiary support, the defendant contends that "many residents of the State of Michigan are enraged that such an alleged incident occurred not just in their country, but in their home state, near their home city, at the airport that they frequent." (Defendant's Motion at 3). In *Skilling*, the defendant's victims were numerous and the community impact of his crimes widespread. *Skilling*, 103 S.Ct. at 2917. There, however, the Supreme Court found that the questionnaire and follow-up *voir dire* were "well suited" to identifying jurors' connections to Enron. *Id.* There is no reason to conclude that such measures will prove inadequate in this case.

This case is markedly different from those in which the Supreme Court has presumed prejudice from pretrial publicity. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), for example, on

three occasions shortly before the trial, a local television station broadcast an in-jail twenty minute interrogation of the defendant in which he confessed to the charged murder. The Court concluded that Rideau presumptively could not have received a fair trial "because it considered the trial under review 'but a hollow formality" – the real trial had occurred when tens of thousands of people in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras." *Murphy*, 421 U.S. at 799. Characterizing the trial that followed the televised confession as "kangaroo court proceedings," the Supreme Court reversed the defendant's conviction. *Rideau*, 373 U.S. at 726.

In *Estes v. Texas*, 381 U.S. 532, 538 (1965), "the trial was conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment." *Murphy*, 421 U.S. at 799. In *Sheppard v. Maxwell*, 384 U.S., 333 (1966), where the defendant was accused of bludgeoning his pregnant wife to death, "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom." *Id.* at 353. A "carnival atmosphere" pervaded the trial. *Id.* at 354. Significantly, the Supreme Court in *Sheppard* noted that the pretrial coverage, consisting of "months [of] virulent publicity about Sheppard and the murder," did not alone deny the defendant due process. *Id.* In short, the Supreme Court has applied the presumption of prejudice from pretrial publicity when the "trial atmosphere [was] utterly corrupted by press coverage". *Murphy*, 421 U.S. at 798. There is no basis to reach such a conclusion in this case.

It bears noting that venue transfer requests have been denied in terrorism cases "involving substantial pretrial publicity and community impact . . ." *Skilling*, 103 U.S at 2913, n.11. citing the 1993 World Trade Center bombing, *see United States v. Salameh*, No. S5 93 Cr.

0180(KTD) (SDNY. Sept. 15, 1993); *United States v. Yousef* , No. S12 93 Cr. 180(KTD) (SDNY, July 18, 1997), aff'd 327 F.3d 64, 155 (2nd Cir. 2003), and the prosecution of John Walker Lindh, United States v. Lindh, 212 F.Supp. 2d 541, 549-551 (E.D.Va. 2002); *see also, United States v. Zacarias Moussaou*i, Crim. No. 01-455-A, Docket entry June 25, 2002, E.D.Va.

In this case, the defendant has failed to demonstrate that pretrial publicity must be presumed to have jeopardized his right to an impartial jury. As such, this Court must then determine whether the pretrial publicity rises to the level of actual prejudice. *Foley*, 488 F.3d at 387. *Voir dire* is the primary vehicle for ascertaining actual prejudice. *Id.* As the Sixth Circuit has explained,

> The merit of a change of venue motion is most likely to be revealed at *voir dire* of the potential jurors. Through proper questioning the court can determine the extent of the veniremen's exposure to the publicity and the effect it has had upon them. Exposure to publicity alone does not presumptively deprive the defendant of his right to fair and impartial jurors. Rather, the test is whether any potential juror who has been exposed to publicity can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Johnson, 584 F.2d at 154 (citations and quotations omitted).

In this case, the Court has fashioned an extensive written questionnaire that will probe a prospective juror's exposure to any pretrial publicity. In addition, each juror will be subject to individual *voir dire* during which follow-up questions relating to pretrial publicity can be probed further. Through these measures, the Court can determine whether jurors have seen or heard anything about this case, whether they have been affected by it, and whether they can lay aside any preconceived impressions or opinions that they may have formulated. Because the jury questionnaire and *voir dire* will fully expose any prejudice from pretrial publicity, a change of venue is not warranted at this time.

CONCLUSION

For the foregoing reasons, the defendant's Motion For Change of Venue should be denied.

Respectfully submitted,

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Dated: August 26, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to Anthony Chambers. I further certify that I have caused a copy of this filing to be delivered and mailed to the defendant, Umar Farouk Abdulmutallab, Register No. 44107-039, Federal Detention Center, East Arkona Road Milan, Michigan.

s/ Lindsay Black
Legal Assistant
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